United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7067

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United States Court of Appeals

For the Second Circuit.

HUDSON TIRE MART, INC.,
Plaintiff-Appellant,

against

AETNA CASUALTY AND SURETY COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT—
NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLEE

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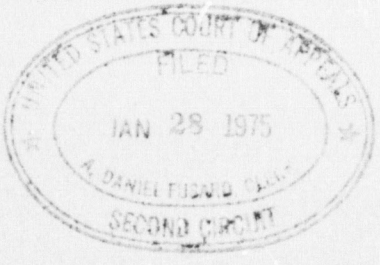

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HUDSON TIRE MART, INC.,

Plaintiff-Appellant,

-against-

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT-
NORTHERN DIS[illegible]ICT OF NEW YORK

BRIEF FOR DEFENDANT - APPELLEE

STATEMENT OF THE CASE

This litigation arises out of a fire which occurred on May 29, 1974 at property owned by the appellant and located at 60 Fairview Avenue, Hudson, New York. (7a)(-references in parentheses are to the Joint Appendix).

Prior to the said fire, the appellee had issued to Hudson Tire Mart, Inc. its policy of insurance numbered 10FP801463FCA covering the premises at which the fire occurred. (6a)

Following the said fire, claim was made by Hudson Tire Mart of the defendant under the said policy of insurance in the sum of $100,000.00. (24a) That claim was in the form of a thirty-five page listing with respect to tires, supplies, parts and equipment of an alleged value of $107,409.85. (24a) Among other allegations, it was contended that 300 tires were "burned out of sight" of a value of $12,534.00. (24a)

Among others, the defendant's policy of insurance contained the following provision:

> "The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account,

bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made."

This provision, pursuant to Section 168 of the Insurance Law of the State of New York, is a portion of the so-called "Standard Fire Insurance Policy of the State of New York."

Pursuant to the above-quoted provision set forth in the said policy of insurance, defendant's attorneys served a notice of examination under oath dated October 11, 1974, a copy of which is attached to the complaint herein. (14a-15a) The said notice was addressed to the insured-appellant, Hudson Tire Mart, Inc., and required the appearance of one Paul DiStefano for examination. As set forth in the papers submitted to the District Court, Aetna's attorneys were advised by the appellant-insured's attorneys that Paul DiStefano was the owner of 49% of the common stock of the appellant-insured, that he was a Director of the said corporation and was also acting as Manager of the business at the location where the fire occurred. (24a) As also disclosed in the Joint Appendix submitted herewith, Paul DiStefano is under indictment with respect to arson in the third degree

in connection with the fire in question. (24a)

Prior to the institution of this present suit in the United States District Court for the Northern District of New York, two attempts were made in the State courts to prevent the scheduled examination under oath. The first attempt was an action instituted by Paul DiStefano in Supreme Court, Columbia County, in which a temporary restraining order was issued preventing the examination under oath. (25a) The order to show cause in that action, dated October 21st, 1974, granted by the Honorable Edward S. Conway, which contained a restraining provision, was vacated by Judge Conway on November 1st, 1974 and the action by Mr. DiStefano seeking declaratory judgment relief was dismissed. (25a)

Hudson Tire Mart, Inc. then commenced a suit in Supreme Court, Columbia County, for declaratory judgment seeking a vacatur of the notice of examination under oath. (25a) A preliminary restraining order was issued by the Honorable John T. Casey on November 13, 1974. Aetna's attorneys appeared before Judge Casey on November 15th, 1974 and requested that the restraining order be vacated. (25a) The Court indicated that it would vacate the restraining order if the notice of examination under oath were modified so as to delete the specific requirement for the production of Paul

DiStefano and if the matter were left in a posture where the notice of examination under oath specified that the defendant would examine the Hudson Tire Mart, Inc. (25a) By stipulation which is also attached to the complaint herein, (16a-17a) the appellee and appellant, each reserving its position, stipulated to a vacation of the said order and to a discontinuance of the said action. (25a-26a)

Appellant then instituted the present action seeking declaratory and injunctive relief upon allegations that the provisions in the Standard Form of policy prescribed by Section 168 of the Insurance Law were unconstitutional as violative of Due Process under the Fourteenth Amendment. Also sought in the action was a preliminary and permanent injunction restraining the Aetna from attempting to examine the appellant.

It is the appellee's contention that the appellant has failed to demonstrate that the District Court abused its discretion in denying the application for preliminary injunctive relief, that there is no "State action" herein, a necessary prerequisite to the constitutional challenge made herein, that the provisions regarding an examination under oath are fair reasonable and valid and, as the District Court concluded, there is neither a reasonable likelihood of success nor a demonstration of irreparable harm to the appellant to warrant

the granting of the preliminary injunctive relief sought.

POINT I

APPELLANT HAS FAILED TO DEMONSTRATE THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ITS REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF.

It is well settled that a motion for preliminary injunction is addressed to the judicial discretion of the District Court and the test upon appeal is whether the District Court has abused that discretion. 7 Moore's Federal Practice, ¶65.04 [2], Pages 65-47, 65-48. The District Court concluded that appellant was not entitled to the injunctive relief sought finding that no irreparable harm would be caused to the appellant, that the presence of the necessary "State action" was doubtful and further, that there was no due process violation. As hereinafter discussed in detail it is respectfully submitted that the District Court's determination is amply supported herein and appellant has failed to demonstrate that the District Court in denying its request, abused its discretion.

Accordingly, it is respectfully submitted that the determination of the District Court should in all respects be affirmed upon this appeal.

POINT II

THERE IS NO "STATE ACTION" PRESENT HEREIN.

Appellant recognizes in its brief (see page 4 of Appellant's brief) that essential to the successful maintenance of the constitutional challenge attempted to be asserted herein is the presence of "State action" within the meaning of the Fourteenth Amendment or its equivalent "color of state law" under 42 U.S. C. 1983. It is the defendant-insurer's position that there is no "State action" herein and accordingly that the insured's suit and purported constitutional challenge is without foundation and cannot be maintained and that the District Court correctly and properly denied the application for a preliminary injunction.

The disputed "action" at issue in this matter is the conducting of an examination under oath by the defendant's representative pursuant to the provision authorizing same contained in the policy of insurance which was issued to the appellant and upon which appellant has made a claim for a fire loss. The defendant is a private insurance carrier, the provision regarding the conducting of an examination under oath is set forth in the insurer's policy of insurance and the proposed examination will be conducted by an attorney designated by the carrier as its representative. No "State

action" is involved.

Appellee respectfully submits that under none of the emerging theories developed in the authorities in this area could one conclude that there is any "State action" herein.

In the first instance, there is or will be no direct participation by any State officer or employee, or any State agency. Indeed, the only connection of the State in this matter at all is the mere fact that the State has legislated in this area by the enactment of Section 168 of the Insurance Law. That such legislation alone does not constitute sufficient participation to constitute "State action" within the meaning of the Fourteenth Amendment is well settled. Bond v. Denzer, 494 F. 2d 302 cert. den. 43 United States Law Week 3209; Shirley v. State National Bank, 493 F. 2d 739.

Moreover, unlike the circumstances presented in Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45, there is nothing herein to support a claim that the State and the insurer are joint venturers or partners, or, as characterized by Justice Rehnquist in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627, that there was a "symbiotic relationship" between the parties that was present in Burton, supra. In Burton, supra, the defendant restaurant located in a parking garage owned and

operated by the municipal parking authority had refused service to a black. Aside from the offensiveness of the conduct involved in Burton, the State had provided the property where it occurred. In addition, in that case the State had used public funds to finance the construction of a parking garage in which the discriminating restaurant was located, and the public nature of the building guaranteed the restaurant tax exemption for any improvements it might make in the realty, and further rental payments by the private enterprise were found to be essential to the successful financing of the public project. In the present case there is no such direct State participation herein. The defendant-appellee is a private insurance company and is not the recipient of State aid via grant or loan. Moreover, as noted by the Court in Bond, supra:

> "The 'entwinement' cases, of which Burton is the prototype, represent generally case of direct government subsidation by grant or loan, of otherwise private institutions." 494 F. 2d at p. 306

This Court's comments in distinguishing Burton, supra, from the factual situation presented to it in Bond, supra, are equally appropriate here:

> "They represent factual patterns so much at variance with the facts in this case that any further discussion of them is not fruitful here." 494 F. 2d 306

Two decisions of this Court are in point. In Shirley, supra, the issue presented was whether the Connecticut Retail Installment Sales Act was unconstitutional. That case involved specifically the self-help repossession concept in conditional sales transactions. The challenged law provided in substance that upon default by a purchaser under a retail installment contract the holder of the contract might repossess the goods without requirements of any prior hearing or notice to the purchaser if the contract expressly made the default a ground for retaking the property. The contract in question which had been entered into between the parties to that action provided for repossession by the seller without prior notice to the purchaser.

This Court concluded that the peaceful repossession of the automobile in question in accordance with the terms of the contract between the parties did not constitute "State Action." It was noted that when the plaintiff purchased the automobile she agreed in the retail installment contract to the repossession provision, and thus, having agreed in advance to the seizure of the vehicle, there was no conspiracy between the defendant and the State of Connecticut, but rather a contract between the plaintiff and defendant.

It was argued in Shirley, supra, that the Connecticut

plaintiff's claims.

This Court noted that there was no direct participation there by any State officer or agent. In addition, when it examined the principles upon which a finding of "State action" might be premised, it concluded that "no State action" was involved. In the first place, this Court found that there was no joint ventureship or partnership involved between the State and the defendants. The loan company defendants there were private companies and not beneficiaries of direct government subsidation by way of grant or loan. In addition, the argument was rejected that the fact of licensing and regulation by the State made the defendant and State partners in the enterprise. This Court further noted that the regulations of the entire Article 3A which had been challenged were designed primarily for the benefit of the borrower and contained safeguards. With respect to the fact that repossession without notice was provided for by the challenged statute, it was indicated that, as in Shirley, supra, the plaintiffs had entered into an agreement with the defendant containing a provision providing for repossession in the event of default without notice. Also rejected was the argument that a "contract of adhesion" was involved. This Court noted that the entire scheme of the legislative pattern was for the benefit of the

borrower and that safeguards were provided in that statutory scheme. Moreover, this Court noted that in view of the admittedly unequal bargaining position of the parties, the impoverished debtor was not subjected to the whim of the creditor since the terms of the agreement were fixed by the State, which had equalized the bargaining posture of the borrower.

As with both Shirley and Bond, supra, the conclusion that there is no "State action" herein is inescapable.

In both those decisions, while a specific statutory enactment provided for the disputed "action", i.e., repossession without notice or execution of wage assignment without notice, the authorization for each type of "action" was specifically incorporated in an agreement or contract which was entered into between the parties, giving the respective defendants under the specified circumstances authority to repossess or execute the wage assignment. In the present case the provision for an examination under oath was expressly set forth in the contract of insurance which was requested and purchased by the appellant and entered into by and between the parties hereto, and the insurer's exercise of its right to examination is being made pursuant to the contractual agreement between the parties set forth in the policy of insurance where it was specifically

provided that, in the event of loss, the insurer would have a right to conduct an examination under the policy.

Moreover, as in both Bond and Shirley, supra, the conducting of an examination under oath is not mandated by statute but rather the decision in any given instance as to whether to exercise the right of examination is one for the insurer solely.

As hereinafter discussed in detail in POINT III of this brief, as was the case both in Bond, supra, and Shirley, supra, the preparation and adoption of the standard policy was affected for the benefit of the insured. Its purpose was to prevent a company from inserting whatever provisions it desired in the contract of insurance and it specifically and precisely defines the respective obligations of the parties to the agreement. Moreover, it provides a uniform agreement for all parties. Also as in Shirley, supra, adoption of the standard form has eliminated the situation in which an insured might be subjected to the decision of an insurer to insert whatever policy provisions it desired and by adoption of the standard form of policy, in a very real sense, the terms of the agreement between the parties have been fixed by a uniform policy which has equalized the bargaining position of the insured.

The Appellant seeks to distinguish the prevailing

situation herein from that in Shirley by contending that the examination under oath clause is solely for the company's benefit and also constitutes a contract of adhesion. The appellant respectfully submits that as was done by this Court in Shirley and Bond, the challenged clause must be read and considered not alone and by itself, but rather in context with all of the other applicable provisions of the Insurance Law. Appellee submits this is the approach adopted in both those decisions for one could hardly contend that the specific provisions under scrutiny in those cases i.e. wage assignments and repossession without notice, in and of themselves were enacted or provided for the consumer's benefit. As in both those decisions, Section 168 and the entire standard form policy must be read and considered in context with the other provisions of the Insurance Law which provide specific safeguards for the insured. For example Section 171 of the Insurance Law provides that if the policy contains a provision permitting examination under oath of the insured and if such examination is conducted and reduced to writing, upon demand therefore by the insured, the company must deliver to the insured a copy thereof within ten (10) days. Upon its failure to do so the insurer is penalized by not being able to use the examination under oath in evidence. See also Section 172 of

the Insurance Law which provides further safeguards with respect to the proof of loss condition of the policy by requiring specific written demand therefore by the company and, also sub-division 2 thereof, which affords substantial protection of the insured insofar as the requirement of written notice to the insurer is concerned. There are many other provisions of the Insurance Law providing specific safeguards to the insured and it is readily apparent that the entire plan of the legislation was to provide for the protection of consumer-insureds.

Appellant's argument regarding the policy constituting a contract of adhesion and its attempt thereby to distinguish the present case from Bond and Shirley, supra is also without merit. As discussed herein the adoption of the standard form of policy was for the insured's protection. In view of the respective bargaining positions of the parties, absent such a standardized policy it is highly doubtful that an individual insured would be in a position to insist upon what particular terms and provisions were to be contained in the policy of insurance. Moreover, it should also be reemphasized that while Section 168 does provide that the policies contain a provision authorizing an examination under oath in the event of loss, that section does not mandate or require that such an examination be conducted in each and every instance in which a

claim is made upon an insurance policy. Rather the decision in each case as to whether or not to conduct such an examination is that of the carrier involved.

Appellant also seeks to distinguish the present case from Bond, supra, by relying upon what it claims is the extensive State regulation of the insurance industry as well as the revenue derived by the State from the licensing of insurers and policy sales. It is respectfully submitted that the "regulation" argument i.e. predicating "State action" upon extensive State regulation, is met by the recent Supreme Court decision in Jackson v. Metropolitan Edison Company, 43 U.S. Law Week 4110. Petitioner Jackson sought to pursue a due process challenge to the respondent utility's termination of her electrical service without notice or hearing. Among the arguments advanced by her as constituting the requisite "State action" in that case was the fact that the respondent Utility, although privately owned, was subjected to extensive State regulation. The Supreme Court rejected that argument and concluded that no "State action" was present despite the extensive regulatory scheme in existence. It further noted that even assuming a "monopoly" status of the utility, which was suggested by the petitioner therein, that fact was not determinative in concluding whether "State action" was present.

Nor does the revenue argument advanced by the appellant provide the necessary "State action." It should be noted that the revenue aspect was but one element considered by this Court in Bond, supra. Furthermore, and most importantly, as was held in Bond and Shirley, supra, the requisite "State action" must be related to the challenged activity. In the present case there is no connection whatsoever between the challenged activity herein and the alleged revenue producing measures. Adoption of the appellant's argument that the State's interest in promoting insurance policy sales because of the tax revenues to be derived therefrom is a sufficient basis upon which to predicate "State action" would expand that concept unwisely to practically cover every field of commercial enterprise. The State is always interested in promoting the sales and profits of every business as increased sales and profits will generally increase State tax revenues. The concept of tax revenue however has no bearing whatsoever on the challenged activity herein and should be regarded as failing to provide sufficient State involvement so as to constitute "State action."

In view of the Supreme Court's determination in the Jackson v. Metropolitan Edison Company case, supra, it is respectfully submitted that the decision in Stern v. Massachusetts Indemnity and Life Insurance Company, 365 F. Supp. 433,

relied upon by the appellant which was based upon the extensive regulation by the State of the insurance industry is not authority for a finding of "State action" herein.

As discussed earlier, apart from the enactment of Section 168, no other State action is herein involved in the challenged activity and with respect to that legislative enactment alone, that, in it of itself, was not a sufficient or significant involvement by the State herein to warrant a determination of "State action."

Appellee respectfully submits that no "State action" is involved herein and accordingly absent such "State action" there can be no violation of the Fourteenth Amendment or 42 U.S. C. 1983. Accordingly, the District Court properly denied the injunctive relief which was sought by the appellant.

POINT III

THE POLICY PROVISION REGARDING THE EXAMINATION UNDER OATH IS A VALID AND REASONABLE ONE AND DOES NOT VIOLATE DUE PROCESS. FURTHERMORE THERE IS NO LIKELIHOOD THAT APPELLANT WOULD BE SUCCESSFUL ON THE MERITS HEREIN TO WARRANT THE GRANTING OF A PRELIMINARY INJUNCTION.

It is respectfully submitted that as discussed in Point II of his brief there is no "State action" herein which is fatal to appellant's suit herein. However, it is also

appellee's contention that the policy provision regarding the examination under oath is a valid and reasonable one, that it is not violative of due process, and further that there is no likelihood of success on the merits herein sufficient to warrant the granting of a preliminary injunction. Accordingly the District Court properly denied appellant's application therefore.

The challenged policy provision herein quoted earlier, is a portion of so-called "standard fire insurance policy of the State of New York" set forth in Section 168 of the Insurance Law. The New York standard fire insurance policy currently in effect is often referred to as the 1943 New York standard fire policy as it was enacted by the New York Legislature in that year (Laws 1943, Chapter 671). In substance, and particularly with respect to the particular provision in question, it is substantially identical to the 1918 New York standard form policy which was applicable and in effect until the 1943 standard form policy was adopted by the New York Legislature. The 1918 version replaced the 1887 form.

The adoption by this State and other states of the Union of the standard form of fire policy was accomplished for the benefit of the insureds who prior thereto were often subjected to varying and often conflicting and inconsistent

provisions in various policies of insurance. The historical background underlying adoption of the standard form policy is succinctly discussed in Richard's on Insurance, 5th edition (1952), Section 497:

> "The dissimilarities existing in earlier times between numerous forms of fire policies in common use, resulting in inconveniences and uncertainties, especially in cases where the same property was insured by policies in different companies, which thus often furnished inconsistent provisions for the adjustment of the one loss sustained by the one party. It frequently happened that, though overinsured, the plaintiff could not recover full indemnity. Moreover, many policy clauses devised in the interest of the companies were unreasonably technical, and were commonly printed in type so fine as to be well-nigh unintelligible without the aid of a magnifying glass. Such consideration influenced the legislatures of many States to adopt a uniform fire policy, the use of which is made compulsory so far as property situated within the particular state is concerned."

The 1943 New York standard form of policy has been adopted in forty-nine states of the Union and is currently in effect therein. (See Richards on Insurance, 1968 Cumulative Supplement, Page 118).

Since adoption of the standard fire policy, over the years and indeed, currently, literally millions of insurance policies all over the country have been written in conformity therewith.

The thrust of the appellant's attack herein is directed to the provisions of the New York standard form policy which provide that the insured shall submit to examination under oath by any person named by the company. That particular provision is contained in the policy of insurance upon which this action is based and is a portion of the contract which was entered into between the appellant and the appellee when the policy was issued and obtained by the appellant.

The validity and reasonableness of this particular provision has been upheld by a variety of courts, both at the State and Federal level in a number of cases. See Volume 5A Appleman, Insurance Law and Practice, Section 3549 and cases from various jurisdictions cited therein, Claflin v. Commonwealth Insurance Company, 110 U.S. 81, Mier v. Niagara Fire Insurance Company, 205 F. Supp. 108, Simonetti v. Niagara Fire Insurance Company of New York, 74 F. Supp. 726, affirmed American Macaroni Manufacturing Co. v. Niagara Fire Insurance Company of N. Y., 164 F. 2d 878, Roberto v. Hartford Fire Insurance Company, 177 F. 2d 811, certiorari denied 70 S. Ct. 622, 339 U.S. 920, 94 L. Ed. 1343, Hart v. Mechanics & Traders Insurance Company of Hartford, 46 F. Supp. 166, Southern Guaranty Insurance Company v. Dean, 252 Misc. 69, 172 So. 2d

553, Happy Hank Auction Co. v. American Eagle Fire Insurance Company, 286 App. Div. 505, modified 1 N. Y. 2d 534, Hickman v. London Assurance Co., 184 Cal. 523. Indeed, the validity and reasonableness of this type of provision was recognized by the Supreme Court of the United States in Claflin v. Commonwealth Insurance Company, supra. The court in that decision had occasion to discuss the purpose of such a provision:

> "The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured."
> 110 U.S. at Pages 94 & 95

In the course of researching the authorities dealing with this type of provision, no authority has been found which indicates that the provision in question is either invalid or unreasonable.

The appellee respectfully submits that the provision in question requiring examination under oath of the insured is a valid, reasonable and legitimate exercise of the company's contractual rights and is in no way violative of the Fourteenth

Amendment of the Constitution of the United States as asserted by the appellant.

As indicated earlier, the provision in question is a portion of the standard form of fire policy, which has been adopted by forty-nine of the states and is currently incorporated in literally millions of insurance policies throughout the country. It is respectfully submitted that the issuance of a preliminary injunction herein would have a devastating affect upon those policies and any and all claims and litigations connected therewith. The granting of an injunction herein could be utilized as a precedent to obtain similar injunctive or restraining relief in a countless number of cases, causing delay and frustrating the rather clear statutory scheme in depriving the companies of the exercise of the rights accorded to them in the contracts of insurance which they entered into with their insured.

Appellant's reliance upon Hovey v. Elliot 167 U.S. 409, 42 L. Ed. 215, 17 S. Ct. 841 and related authorities cited in its brief as applicable herein to support its claim of a due process violation and as demonstrating its likelihood of success on the merits is misplaced. That decision and its successors condemn as violative of due process, the summary striking by the Court of a party's answer and the entry of a

default judgment against him as punishment for that party's contempt. On the other hand, it has been recognized by the Court in Hammond Packing Co. v. Arkansas 212 U.S. 322, 53 L. Ed. 53090 S. Ct. 370 that a court has power to strike an answer and enter a default judgment for failure to secure attendance of witnesses and to produce documents. The court in Hammond, supra, distinguished Hovey, supra, on the grounds that while in Hovey, supra, the dismissal was imposed as a mere punishment, in Hammond, supra, "the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."

It is submitted that no due process violation is involved herein nor is the Hovey rationale applicable. In the first instance, that decision and its successors are applicable solely to judicial proceedings; here the right to examination and the conduct thereof is granted by the contractual agreement between the parties. Under the applicable New York authorities, a party is only obligated in such an examination under oath to answer inquiries which are material and relevant as having a bearing on the insurance and the loss. Happy Hank Auction Co. v. American Eagle Fire Insurance Company

supra. While refusal to answer relevant inquiries in such an examination has been held by the courts to constitute a material breach of the insurance contract, (see cases cited on pages 11 and 12 of Appellant's brief) the insured's suit in such an instance is dismissed upon well established contract principles since a material breach of a contract is involved and not as a punishment for contempt as in Hovey, supra, or disobediance of a judicial order. Additionally, a refusal to answer material inquiries it is submitted gives rise to a presumption or admission of the lack of merit on the part of a party's claim.

It is further respectfully submitted that upon the review there is no "due process" violation involved herein as claimed by appellant. As noted by the Court in Gross v. U. S. Fire Insurance Company, 771 Misc. 2d 815:

> "During the examination of the plaintiff he would be entitled to have counsel present and to object to any questions put to him on any legal grounds available to him." (71 Misc. 2d at Page 817)

As to any matter which may be developed during the course of such an examination is concerned, appellant will have an opportunity during the litigation and at the time of the trial to present whatever additional proof, explanation or supplementation it deems necessary either to explain or supplement any specific matters of inquiry covered. Moreover, in the

event a motion were ever made to dismiss the litigation instituted by the appellant on the ground of its failure to answer a material inquiry, appellant would have a full and complete opportunity to argue and present its position to the Court regarding the materiality of the inquiries in issue.

The District Court rejected the appellant's claim and a "due process" violation was involved and its discussion on that issue is appropriate here:

> "Further it is difficult for me to find due process violation likely under the settled concept that due process means the right to be accorded adequate hearing at a meaningful time and in a meaningful manner. Due process is not a rigid formula or simple rule of thumb to be applied undeviatingly to any set of facts. That is a Second Circuit case, Hagopian v. Knowlton, 470 F. 2d 201, at Page 207 (2nd Circuit 1972). It is also impossible for me to ascertain irreparable harm in the true sense of that phrase. Questioning, of course, at any time is best countered always by truthful and cooperative answers. Insurance companies have that right. I cite now Kisting v. Westchester Fire Insurance Company, 290 F. Supp. 141. (Western District of Wisconsin, 1968); affirmed 416 F. 2d 967 (7th Circuit 1969). Also I cite Orozco v. State Farm Mutual Automobile Insurance Company, 360 F. Supp. 223, (Southern District of Florida 1972); affirmed at 480 F. 2d 953, (5th Circuit 1973). There is other writings in the questioning that is sought here. It is always explainable at another time if pre-trial or trial procedures take place in court. This questioning under the contract when applied, in my judgment, in no

way can prevent the insitution of the suit of the plaintiff corporation for its alleged monetary fire loss. When the right to sue for money damages is available, there is no harm that can be considered irreparable. The fact must be faced that if and when the plaintiff company chooses to sue on the insurance policy it will face in the state or federal court system liberal pre-trial depositions and discovery procedures.

It is important to my mind to note that questions and answers, oral or written, are a customary and usual feature of every insurance contract, - life, health, automobile, disability and soforth. In that regard I cite Herron v. Millers National Insurance Company, 185 F. Supp. at Page 851, 854 (District of Oregon) and Mier v. Niagara Fire Insurance Company, 205 F. Supp. 108, 110 (Western District of Louisiana, 1972)." (30a-31a)

Appellee respectfully submits that there is no due process violation involved herein and that the provision for an examination under oath is a valid and reasonable one. In view thereof and the absence of any "State action" as discussed earlier, there is no likelihood of appellant's success on the merits herein and the District Court properly denied appellant's application for preliminary injunction.

POINT IV

NO IRREPARABLE HARM WILL BE SUFFERED BY THE APPELLANT BY THE DENIAL OF THE INJUNCTIVE RELIEF SOUGHT.

In order to warrant entitlement to preliminary

injunctive relief, one seeking such relief must establish to the Court's satisfaction, among other matters, that it will be irreparably harmed and further that upon a balancing of interests of the respective parties, the damage to the party seeking relief far outweighs the harm to the opposing party.

It is respectfully submitted that appellant herein has failed to demonstrate that irreparable harm would be occasioned to it unless the injunctive relief sought by it were granted. The District Court concluded that no irreparable harm would be occasioned to the appellant by the denial of its motion for injunctive relief and this determination, appellee respectfully submits, is well founded. If the examination scheduled by the appellee is conducted, the appellant will be asked to answer inquiries concerning the fire in question and the various elements and amounts of damage which are claimed by the appellant as a result thereof. No harm can result to appellant if this is done. By well established judicial construction, appellant is only obligated to answer inquiries which are material as having a bearing upon the insurance or the loss. Happy Hank Auction Co. v. American Eagle Fire Insurance Company, supra. If the appellant pursues litigation in this matter to enforce its claim upon the policy all of the relevant facts and circumstances surrounding the loss and damage

claim will ultimately have to be disclosed by the appellant if it is to succeed therein. Moreover, as far as any matter which might be developed during the course of such an examination is concerned, appellant will have an ample opportunity during the course of the litigation and at the time of the trial to present whatever additional evidence or explanation it deems necessary to explain, supplement or corroborate any specific area of inquiry. It is thus respectfully submitted that the appellant's claim of irreparable harm is without merit and as the District Court correctly concluded, no real prejudice can be demonstrated by the appellant if the examination proceeds and its request for injunctive relief were denied.

Moreoever, upon the balancing of interest of the respective parties, it is clear that the granting of injunctive relief would seriously prejudice the appellee's rights. The granting of such relief would frustrate the very purpose for which an examination is provided and would deprive the appellee of a substantial and important right which was granted to it by the contractual agreement between the parties herein. As di - cussed earlier, two suits have already been instituted in the New York State Supreme Court to block the examination and two stays preventing the holding of such an examination have already been granted. Both stays were subsequently vacated by the

courts which granted them. The fire occurred several months ago and by reason of the various attempts to stay the examination, a substantial delay has already occurred herein. Moreover, a substantial and complex claimed inventory has been submitted to the insurer in connection with the appellant's insurance claim herein. Delay by reason of the stays has already occurred and the further delay which an injunction herein would occasion would seriously and substantially impair and jeopardize the insurer's ability to inquire into the fire and the damage claimed to determine its genuineness and to obtain further investigation as to whether this is a fraudulent claim. When the purpose of an examination under oath is considered as set forth hereinbefore, it can readily be seen that the conduct of such an examination as close in point of time to the actual loss as possible is imperative. Appellee has already been substantially delayed in conducting such an examination and the further delay which the granting of an injunction would accomplish would in a very real sense give to the appellant an undue and unfair advantage and would substantially prejudice and jeopardize the insurer's rights in this matter.

In summary, it is respectfully submitted that the appellant has failed to demonstrate that the District Court abused its discretion in denying the application for injunctive

relief. Under the circumstances presented, the District Court, in view of the absence of any "State action," the validity and reasonableness of the disputed provision and the absence of irreparable harm to the appellant as well as the absence of any reasonable likelihood that appellant would be successful on the merits, wisely and properly denied the application. That determination should in all respects be affirmed by this Court.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD IN ALL RESPECTS BE AFFIRMED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HUDSON TIRE MART, INC.,

Plaintiff-Appellant,

-against-

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Appellee.

74-8395

AFFIDAVIT OF SERVICE BY MAIL

on Appeal from the UNITED STATES DISTRICT COURT--NORTHERN DISTRICT OF NEW YORK.

STATE OF NEW YORK)
: ss.:
COUNTY OF ALBANY)

LORRAINE G. HUTCHINSON, being duly sworn, deposes and says: That deponent is not a party to the action, is over 18 years of age and resides at 36 McArdle Avenue, Albany, New York. That on the 24th day of January, 1975, deponent served three (3) copies of the within Brief for Defendant-Appellee upon JEROME D. BROWNSTEIN, ESQ., 53 Third Street, P. O. Box 839, Troy, New York 12181, the address designated by said attorney for that purpose, by depositing same enclosed in a postpaid properly addressed wrapper in an official

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depository under the exclusive care and custody of the United States post office department within the State of New York.

Lorraine G. Hutchinson

Lorraine G. Hutchinson

Sworn to before me this

24th day of January, 1975.

Mary E. Humphrey

MARY E. HUMPHREY
Notary Public, State of New York
Residing in Albany County
Commission Expires March 30, 1975

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